No. 03-1511

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT E. WRIGHT, SR.,

Petitioner,

v.

MONTGOMERY COUNTY;
MONTGOMERY COUNTY COMMISSIONERS;
MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit Court's decision to affirm the discrete and specific discretionary evidentiary rulings by the District Court on this record is in conflict with other decisions of the United States Court of Appeals for the Third Circuit or the United States Court of Appeals for the Eighth Circuit.

2. Whether the Plaintiff was denied a fair trial by the discretionary and preliminary rulings of the District Court and after he waived his right to proffer additional witnesses.

LIST OF ALL PARTIES

Petitioner is Plaintiff Robert E. Wright, Sr. Respondents are Defendants Montgomery County and former Montgomery County Commissioners, Mario Mele, Richard Buckman and Joseph Hoeffel. Montgomery County is a political subdivision of the Commonwealth of Pennsylvania.

Although listed in the caption, Maillie Falconiero & Company, LLP and George Falconero are not parties, and appear erroneously on the dockets in the District Court and the Circuit Court as a result of their moving to quash a third-party subpoena.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
List Of All Parties	ii
Table Of Contents	iii
Table Of Cited Authorities	vi
Statement Of The Case	1
Summary Of The Argument	5
Reasons For Denying The Petition	5
1. There Is No Conflict Of Different Panels Within The Third Circuit Or Between The Third Circuit And The Eighth Circuit	5
2. Plaintiff Was Not Prejudiced By His Waiver, Lack Of Proffer, Or The Exclusion Of Any Evidence	11
3. The Excluded Areas Of Testimony From The Former Commissioner Defendants Were Not Relevant To Plaintiff's Claim And Any Probative Value Was Outweighed By Their Prejudicial Effect	14
(a) Mario Mele	14
(b) Richard Buckman	16
(c) Joseph Hoeffel	16

Contents

Page

4. Plaintiff Was Properly Precluded From Calling, The Proffered Witnesses 17

   (a) Jon Fox 17

   (b) Dr. Mash 19

5. Plaintiff Was Not Prejudiced By His Waiver Of Proffers At Trial 21

   (a) "The suspended assistant county solicitor" 22

   (b) The "son of the Clerk of Courts" 23

   (c) The "former county personnel director" 23

   (d) The "head of county security" 24

   (e) The MDHS Staff 24

   (f) The "Two Black employees" 24

   (g) The former County Sheriff 25

   (h) Michael Marino 25

6. Plaintiff Is Not Entitled To A New Trial ... 26

   (a) Plaintiff Failed To Submit Sufficient Evidence To Establish A *Prima Facie* Case Under § 1981 27

Contents

Page

(b) Plaintiff Submitted No Evidence That Defendants' Proffered Reasons For His Termination Were Pretextual 28

(c) Plaintiff Failed To Show That A Majority Of The Salary Board Acted With An Improper Motive 28

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Aguiar v. Morgan Corp., 27 Fed. Appx. 110, 2002 WL 90980 (3d Cir. Jan 23, 2002) 27

Barber v. CSX Distribution Services, 68 F.3d 694 (3d Cir. 1995) 12, 14

Callanan v. Runyon, 75 F.3d 1293 (8th Cir. 1996) ... 6

Christinson v. Big Stone County Co-Op, 13 F.3d 1178 (8th Cir. 1994) 11

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 18, 29

Coleman v. Home Depot, 306 F.3d 1333 (3d Cir. 2002) 11, 22

Connick v. Myers, 461 U.S. 138 (1983) 14, 17

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) 19

EEOC v. L.B. Foster Co., 123 F.3d 746 (3d Cir. 1997) 12, 14

EEOC v. U.S. Steel, 649 F. Supp. 964 (W.D. Pa. 1986) 14

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988) 6

Cited Authorities

Page

Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1992) 21, 28

Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994) 12, 13, 24, 27, 28

Gomez v. Allegheny Health Servs., Inc., 71 F.3d 1079 (3d Cir. 1995) 21, 25

Hazen Paper v. Higgins, 507 U.S. 604 (1993) 27

Hicks v. Arthur, 878 F. Supp. 737 (E.D. Pa. 1995) 12

Holst v. Countryside Enters., Inc., 14 F.3d 1319 (8th Cir. 1994) 10

Jenson v. Eleventh Taconite Co., 130 F.3d 1287 (8th Cir. 1997) 6

Johnson v. Resources for Human Development, 878 F. Supp. 35 (E.D. Pa. 1995) 28

Jones v. School District of Phila., 198 F.3d 403 (3d Cir. 1999) 12

Keiser v. Matamoras Cmty. Church, 66 Fed. Appx. 358, 2003 WL 21000922 (3d Cir. May 05, 2003) 17

Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101 (3d Cir. 1997) 28

LaVerdure v. Montgomery County, 324 F.3d 123 (3d Cir. 2003) 29

Cited Authorities

Page

Link v. Mercedes-Benz of North America, 788 F.2d 918 (3d Cir. 1986) 11

Longstreet v. Holy Spirit Hosp., 67 Fed. Appx. 123, 2003 WL 21205881 (3d Cir. May 23, 2003) 12

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 13, 28

National Freight v. S.E. Pa. Transp. Auth., 698 F. Supp. 74 (E.D. Pa. 1988) 22

Quinn v. Consolidated Freightways Corporation of Delaware, 283 F.3d 572 (3d Cir. 2002) 5, 6

Quiroga v. Hasbro, Inc., 934 F.2d 497 (3d Cir. 1991) 27

Simpson v. Kay Jewelers, 142 F.3d 639 (3d. Cir. 1998) 28

Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981) 27

Walden v. Georgia-Pacific Corp., 126 F.3d 506 (3d Cir. 1997) 10, 11, 12, 14, 27

Williams v. Drake, 146 F.3d 44 (1st Cir. 1998) 10

Cited Authorities

Page

Statutes:

16 P.S. § 4820 28

16 P.S. § 4822 28

16 P.S. § 4825(c) 28

42 U.S.C. § 1981 ..... 11, 12

42 U.S.C. § 2000(e) 12

Other Authorities:

Advisory Committee Notes to FED. R. EVID. *701* ... 20

Rules:

FED. R. CIV. P. 26 20

FED. R. CIV. P. 26(a)(2)(B) 19

FED. R. EVID. 103(a)(2) 10

FED. R. EVID. 401 11

FED. R. EVID. 402 11

FED. R. EVID. 403 ..... 11, 20, 22

FED. R. EVID. 701 19

FED. R. EVID. 702 19

STATEMENT OF THE CASE

Petitioner/Plaintiff/Appellant Robert E. Wright, Sr. alleged that he was terminated as Director of the Montgomery County Department of Housing Services ("MDHS") in retaliation for protesting against mistreatment for being African-American. (App. 2a, 8a.)[1]

Plaintiff was one of three MDHS employees terminated after the U.S. Department of Housing and Urban Development, Office of Inspector General ("HUD") audited the MDHS. All three MDHS employees were named in the HUD Audit Report (D-1) as engaging in conflicts of interest and other serious misconduct. The other two terminated employees are male Caucasians, who were supervised by Plaintiff. Of the three, Plaintiff's misconduct was by far the most egregious.

The HUD Audit Report detailed seven chapters of findings, any ***one*** of which justified Plaintiff's termination: (1) there were no assurances that contractors completed rehabilitation work in accordance with specifications; (2) procedures were inadequate to prevent conflicts of interest; (3) there were no assurances that rental rehabilitation costs were fully supported and reasonable; (4) procedures were needed to be improved for purchasing supplies and services; (5) improvements were needed to ensure rental rehabilitation benefits to low-to-moderate-income households; (6) improved systems for scheduling and conducting annual inspections of rental units were needed; and (7) contractors' insurance coverage needed to be verified. (D-1.)

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1. Petitioner's Brief does not contain citations to the record for factual statements, and his Appendix does not include the extensive trial record from this jury trial in which forty-six (46) defense exhibits ("D-__") were admitted into evidence. Therefore, Respondents' factual citations are restricted to the trial record because of the absence of the factual record in Petitioner's Appendix.

The HUD Report also identified procedural deficiencies in the MDHS that included: (1) $138,347 in work was either not done at all or not done properly; (2) substandard housing conditions were not corrected and properties did not meet federal housing quality standards; (3) proper procedures were not followed to award bid contracts; (4) contractors had inadequate insurance coverage; (5) $234,000 in supplies and services could not be assured to have been paid at the lowest available prices; (6) necessary documentation for verifying affordable rents and qualified tenants were not obtained and tenants were overcharged; (7) required property inspections were not performed and rental units were not maintained in a decent, safe and sanitary condition; and (8) proper and required paperwork, including change orders, was never filled out or submitted. *Id.*

Plaintiff obstructed the HUD Audit, lied to the HUD Auditors and Defendants, and obstructed Montgomery County's timely and informed response to the HUD Audit. The Defendant Commissioners testified at trial that this misconduct jeopardized tens of millions of dollars in federal funding for Montgomery County's low income citizens.

The District Court provided Plaintiff with a full and fair opportunity to present his case to the jury. The Circuit Court "reviewed this matter and . . . examined the district court's comprehensive series of orders and dispositions" and concluded that "it is very clear to us that the district court was very diligent in its management of this case and, exercising the appropriate standards of review, we find no error in its numerous dispositions." (4a.)

The trial record overwhelmingly confirms that Defendants' reasons for termination were not pretextual, and that they acted rationally and reasonably in terminating Plaintiff, and the two male Caucasian employees, whom he

admittedly supervised, after the HUD Audit detailed his numerous conflicts of interest, mismanagement and misconduct in the federally funded HUD/MDHS housing programs, in blatant violation of Montgomery County, State, and HUD Regulations. Plaintiff was suspended, and then terminated by the County's Salary Board, consisting of the three Defendant Commissioners and the non-party Controller, based on HUD's findings and the County's independent internal investigation, which were confirmed in two days of Plaintiff's Grievance Hearings.[2]

HUD specifically named Plaintiff as personally engaging in numerous instances of undisclosed conflicts of interest over at least a six year period from 1989 through 1995, when he controlled these HUD funded programs, in violation of HUD Regulations, State Ethics laws, and the County Handbook. (D-1 at p. 15.)

Plaintiff's testimony at trial showed that his conflicts of interest began as early as 1985, when he secretly received a ***free*** 50% partnership in a real estate company, without making any capital contribution, in violation of State and County ethics rules. From July, 1985 through the time of his suspension in March, 1996, Plaintiff and his secret

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2. The County's internal investigation revealed, *inter alia*, that Plaintiff mistreated and spoke abusively to one of the elderly African-American women whose complaints about the shoddy work done on her home by a conflicted contractor sparked the HUD Audit. It revealed that Plaintiff routinely conducted private business and personal recreation during work hours. It found that Plaintiff was often out of state on personal matters after he fraudulently signed into the MDHS office log, and thus misrepresented that he was at work on government time. Plaintiff also purchased an appliance from a HUD vendor, billed it to the MDHS, and only belatedly paid for it (while still illegally avoiding Pennsylvania sales tax) after the vendor dunned the County for almost a year, and the Controller's Office tracked the invoice down to a personal property owned by Plaintiff.

partnership obtained several properties and then had HUD contractors perform work on them in blatant conflicts of interest, and in violation of the Montgomery County Handbook, the HUD Standards of Conduct, and the State Ethics Act. Plaintiff corruptly awarded public contracts to these HUD contractors, while they were providing personal work and supplies to him. Then, in blatant conflicts of interest, Plaintiff, and the two other terminated MDHS employees, "inspected" these corrupted contractors' work, and routinely authorized public payments to them, while receiving personal "discounts" or "preferred pricing."

Plaintiff was terminated because of the findings of the HUD Report, and the additional misconduct discovered by Defendants when they investigated the HUD findings. There was no racial motivation behind his termination. Defendants acted reasonably, prudently and in the public interest in responding to HUD's concerns. If Defendants had ignored the HUD Report, they would have violated their fiduciary duties to the public and taxpayers of Montgomery County; jeopardized millions of dollars in HUD housing subsidies; and compromised the integrity of MDHS and its federally funded housing programs to the great detriment of Montgomery County's low income citizens.

Plaintiff was an at-will employee. He was also a public official charged with fiduciary duties to Montgomery County, the public and the citizens that he was employed to protect and service. He abused his office to selfishly serve his private economic interests. Plaintiff was not terminated for racial reasons, but for his egregious conflicts of interests, mismanagement, nondisclosures and misconduct.

SUMMARY OF THE ARGUMENT

Plaintiff is not entitled to a new trial. The discrete areas of Defendants' testimony that were limited by the trial judge were not relevant to Plaintiff's claim, and any probative value was outweighed by their prejudicial effect. He was properly precluded from calling three witnesses at trial, for whom Plaintiff did not proffer any relevant or admissible evidence.

Plaintiff waived any objection to the District Court's pre-trial evidentiary rulings by failing to comply with the May 20, 2002 Order requiring proffers of evidence at trial. Additionally, even if he had not waived it, he was not prejudiced by his own lack of proffer, or the exclusion of any evidence. In contrast, the prejudicial value of the evidence identified by Plaintiff after the trial would have mandated its preclusion if it had been proffered.

REASONS FOR DENYING THE PETITION

1. There Is No Conflict Of Different Panels Within The Third Circuit Or Between The Third Circuit And The Eighth Circuit.

In this case, the United States Court of Appeals for the Third Circuit "reviewed" and "examined" the record of this case and held that there was no error in the District Court's numerous discretionary dispositions. (App. 4a.) This holding is not in conflict with any decision of a different panel of *any* Circuit Court.

Petitioner cites to *Quinn v. Consolidated Freightways Corporation of Delaware*, 283 F.3d 572 (3d Cir. 2002). In *Quinn*, the Circuit Court reversed a *sanctions* order and held:

> The trial court's blanket exclusion of Passion's testimony regarding a hotel incident involving Kudrick and Quinn is not supported *by this record.*

Quinn, 283 F.3d at 578 (emphasis added).

The holding in *Quinn* is not in conflict with the holding by the Circuit Court in this case that the District Court did not commit an abuse of discretion in its evidentiary rulings *based on this record.* (App. 4a.) In this case, the District Court did not enter any sanctions order that barred any evidence. It made specific evidentiary rulings and did not make any "blanket" exclusions. Significantly, most of the purported evidence which Petitioner argues was excluded was, in fact, never excluded. Petitioner simply failed to proffer it.

Similarly, the cases cited by Petitioner from the United States Court of Appeals for the Eighth Circuit are not in conflict with the Circuit Court decision in this case. In *Callanan v. Runyon*, 75 F.3d 1293, 1298 (8th Cir. 1996), the Circuit Court held that the District Court did *not* abuse its discretion in excluding evidence. In *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988), the Circuit Court held that the District Court erred in determining blanket exclusions of evidence "*before trial began.*" Here, the District Court *preliminarily* ruled on evidence and specifically directed the Plaintiff to proffer the evidence at trial, which he failed to do.[3]

Prior to trial, Plaintiff repeatedly changed his witness list by informal correspondence that reached eight-eight (88) trial witnesses. Defendants continually requested Plaintiff to file a final Pre-Trial Memorandum consistent with the District Court's Summary Judgment Orders, which dismissed seven of the eight counts of the Complaint, and several civil rights claims in the remaining Count I. However, Plaintiff refused to do so. Therefore, on April 20, 2002, Defendants

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3. In *Jenson v. Eleventh Taconite Co.*, 130 F.3d 1287, 1295-97 (8th Cir. 1997), the Circuit Court held that a Special Master erred in excluding six medical experts at the trial based upon personal and erroneous preconceived notions relating to psychiatric proof. This was not an issue in this case, and Plaintiff never even retained an expert.

filed a Supplemental Pre-Trial Memorandum and were required to list numerous witnesses to refute Plaintiff's 88 witnesses. Accordingly, the District Court properly exercised its discretion in preliminarily ruling on the parties' numerous witnesses.

The District Court's May 20, 2002 Memorandum and Order (Dkt.#251) ***preliminarily*** excluded certain of the parties' potential witnesses identified in their respective Pre-Trial Memoranda. (App. 15a, 30a-31a.) It did not make a "definitive ruling" precluding any witnesses. Rather, the Court ***expressly ordered the parties to make an offer of proof at trial*** if they determined any of the witnesses to be necessary:

> In their Pre-Trial Memoranda, the parties have identified numerous witnesses that they intend to call at trial. . . . Only witnesses that this Court has found to be relevant as indicated below may be called during trial. All other witnesses are prohibited from being called during this trial *absent a renewed proffer acceptable to the Court*. . . .

(App. 15a; emphasis added)

On the morning of the second day of trial, during Plaintiff's *direct* testimony, the District Court further explained to Plaintiff's counsel that he could proffer any additional witnesses:

> THE COURT: The order says, hereby ordered that all witnesses not found above to be relevant are prohibited from testifying during trial, ***absent renewed proffer acceptable to the Court*** after all witnesses presently determined by the Court have made relevant testimony, have testified.

Now, you've only had one witness. Aren't you being rather precipitous?

MR. THOMPSON: I'm not trying to be precipitous, it's just that for instance a number of the witnesses that are deemed irrelevant would have been office staff of Mr. Wright, the McMullans, the Bordens, et cetera. Even though Mr. Wright on his own can testify as to the runnings et cetera of the office, and it's not that they would be cumulative each had little different aspects which would be —

THE COURT: Well, there's always rebuttal as you know in a trial procedure. If after cross-examination there's some query that has been raised as to the credibility of Mr. Wright's testimony on a certain area about a HUD regulation or what have you, if you don't have the written regulating [sic] you might want to have somebody come — ***proffer to me that you need someone*** who had direct line responsibility come in and testify. . . .

* * *

THE COURT: Well, now, you're getting into the counter claim. See you have to prove your case first.

MR. THOMPSON: Okay.

THE COURT: Your discrimination case. I'm trying to keep you learned counsel on the same page.

> You have got to come up with all of the basic reasons. Then the burden shifts. Mr. Elliott has to come back and he has to challenge that and then after we get through all of that and then that parts done, then Mr. Elliott puts in his case. Which has all other kinds of concerns in it, that, you know, Mr. Elliott was trying to fast forward to yesterday.
>
> Then he can bring Mr. Wright back on the stand as on cross, and you can go into all of those areas that are relevant to your claims at that time. At which time then you can challenge whatever witnesses Mr. Marino ***whoever else you can profit [sic proffer] me again*** and see who's relevant for those determinations.

5/22/02 Tr. at pp. 59-62 (emphasis added).

After two weeks of trial testimony, in response to a specific request by the Court at trial for such proffers, Plaintiff chose not to make any, and waived any claim of error in the preliminary discretionary rulings he challenges on appeal:

> THE COURT: What other witness would you like to proffer then, Mr. Thompson, other than Dr. Mash.
>
> MR. THOMPSON: I believe that would be the plaintiff's case, Your Honor.
>
> MR. THOMPSON: We rest.

6/3/02 Tr. at p. 6.[4]

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4. During the trial, Plaintiff only proffered three witnesses that the Court excluded, two of whom are discussed in Plaintiff's Petition and therefore, *infra*, in this Opposition Brief: Plaintiff's treating physician, Dr. Mash and a former Montgomery County Commissioner, Jon Fox.

Plaintiff failed to make such proffers and failed to call them as witnesses. (App. 15a, 30a-31a.) In fact, Plaintiff failed to even serve many of the witnesses with trial subpoenas, thereby demonstrating that he never intended on calling them at trial.[5] Plaintiff waived any claim of error by failing to make an offer of proof at trial with respect to any of the irrelevant, cumulative witness testimony he now belatedly claims was erroneously excluded. FED. R. EVID. 103(a)(2). *See also Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 517 (3d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *Williams v. Drake*, 146 F.3d 44, 49 (1st Cir. 1998); *Holst v. Countryside Enters., Inc.*, 14 F.3d 1319, 1323 (8th Cir. 1994).

In *Walden*, an employment discrimination case, the district court made a tentative pre-trial ruling to exclude certain witness statements on the grounds of relevance and indicated that these rulings may be reconsidered in the context of the trial. *Walden*, 126 F.3d at 517. Nonetheless, the plaintiff failed to make an offer of proof at trial. The Third Circuit Court of Appeals stated that:

> . . . a party is only excused from an offer of proof at trial if the district court's in limine ruling was definitive with no suggestion that the court would reconsider the ruling. The district court clearly stated at the outset of the hearing that its rulings were tentative and that it would reconsider those rulings at trial, and the court never retreated from that position.

Id. at 520.

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5. Pursuant to Local Rule 45.1 of the United States District Court for the Eastern District of Pennsylvania, Plaintiff was required to serve trial subpoenas at least five (5) days prior to trial, or by May 15, 2002, or take their trial depositions prior to trial.

The Eighth Circuit Court of Appeals, described by Petitioner as being in conflict, is in accord with this holding. *See Christinson v. Big Stone County Co-Op*, 13 F.3d 1178, 1180-1181 (8th Cir. 1994).

Plaintiff did not make an offer of proof with respect to the witnesses he now claims were erroneously excluded. Accordingly, he waived his right to claim error concerning the preliminary pre-trial exclusion of Plaintiff's witnesses. *Walden*, 126 F.3d at 520.

2. Plaintiff Was Not Prejudiced By His Own Waiver, His Own Lack Of Proffer, Or The Court's Exclusion Of Any Evidence.

Even assuming *arguendo* that the District Court's *in limine* rulings were in error, which they were not, and even assuming *arguendo* that Plaintiff did not waive any claim of error by failing to make proffers at trial, which he did, Plaintiff has no legitimate claim of substantial injustice or prejudicial error.

Whether to exclude proffered evidence lies within the sound discretion of the Court. *Link v. Mercedes-Benz of North America*, 788 F.2d 918, 921-22 (3d Cir. 1986). Federal Rules of Evidence 401 and 402 require that, for evidence to be admissible, it must be relevant. Additionally, Federal Rule of Evidence 403 requires its probative value to outweigh any danger of unfair prejudice or jury confusion. *Coleman v. Home Depot*, 306 F.3d 1333, 1347 (3d Cir. 2002).

Plaintiff's claim was under 42 U.S.C. § 1981 for retaliatory discharge. To establish a case of retaliation, Plaintiff had to show that: (1) he engaged in protected conduct; (2) his employer took an adverse action against him; and (3) there was a causal link between the protected conduct

and the adverse action. *See Walden*, 126 F.3d at 512 n.4; *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754-55 (3d Cir. 1997), *cert. denied*, 522 U.S. 1147 (1998); *Barber v. CSX Distribution Services*, 68 F.3d 694, 702 (3d Cir. 1995).[6]

To establish the requisite causal connection, Plaintiff had to show that the persons who took the adverse action against him *knew* of the alleged protected activity and acted with a retaliatory motive. *Jones v. School District of Phila.*, 198 F.3d 403, 415 (3d Cir. 1999). There must be evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Id.*; *Longstreet v. Holy Spirit Hosp.*, 67 Fed. Appx. 123, 2003 WL 21205881, *4 (3d Cir. May 23, 2003).

"It is not enough to *dis* believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993) (emphasis in original)). "To prevail at trial, the plaintiff must prove . . . that but for the protected [activity], the plaintiff would [not have been terminated]." *Id.* at 764. He "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its sanction that a reasonable factfinder *could* rationally find them "unworthy of credence." *Id.* at 765.

Defendants were entitled to rely upon the findings of the HUD Report, even if HUD were wrong. *Fuentes*, 32 F.3d

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6. The District Court referred to Title VII at App. 9a because the legal elements of causes of action under § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) are the same. *Hicks v. Arthur*, 878 F. Supp. 737, 738 (E.D. Pa.), *aff'd*, 72 F.3d 122 (3d Cir. 1995).

at 765. Significantly, however, Defendants did *not* rely solely upon the HUD Audit Report, but also conducted their own independent investigation prior to Plaintiff's termination, and provided him with two days of grievance hearings at his request.

After Defendants submitted clear, specific evidence regarding the legitimate, non-retaliatory reasons for Plaintiff's termination, the burden shifted to Plaintiff to show those reasons were pretextual. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Plaintiff had to show that Defendants were motivated by an improper, discriminatory, retaliatory motive in terminating him. He failed to present any such evidence, and he failed to even proffer any at trial.

Plaintiff never testified, and neither submitted nor proffered any other evidence, that the actions about which he allegedly protested or even his termination had anything at all to do with race. 5/22/02 Tr. at 2-150; 5/23/02 Tr. at 2-182; 5/24/02 Tr. at 2-65. Rather, he testified that Defendants had generalized management issues concerning the MDHS. None of this had anything to do with race. The Defendant Commissioners all testified that their reasons for termination included, *inter alia*, the HUD Audit Report and their own investigation of Plaintiff's mismanagement, conflicts of interest, misconduct and nondisclosures in violation of County, State and Federal regulations.

3. The Excluded Areas Of Testimony From The Former Commissioner Defendants Were Not Relevant To Plaintiff's Claim And Any Probative Value Was Outweighed By Their Prejudicial Effect.

Plaintiff's Petition identifies certain discrete areas of testimony that were precluded during the trial by three witnesses, Defendants Mario Mele, Richard Buckman, and Joseph Hoeffel.

Plaintiff's asserted "protected activity" — personal complaints and grievances — is not protected activity, and accordingly, could not support a *prima facie* claim for retaliatory discharge. *Connick v. Myers*, 461 U.S. 138, 147 (1983). It is not enough to show nonspecific complaints about unfair treatment. *Walden*, 126 F.3d at 512 n.4; *L.B. Foster Co.*, 123 F.3d at 754-55; *Barber*, 68 F.3d at 702. General grievances about working conditions simply do not constitute protected activity. *Barber*, 68 F.3d at 702. Any proffered evidence must be connected in time with Plaintiff's termination. *EEOC v. U.S. Steel*, 649 F. Supp. 964, 967 (W.D. Pa. 1986). Accordingly, the following areas of testimony were properly precluded during the trial.

(a) Mario Mele

Plaintiff argues that testimony was precluded by former Commissioner Mele concerning: (1) a 1992 disciplinary action against a former Montgomery County employee; (2) a political event called the Horse Thieves Luncheon at which Plaintiff's counsel claimed some unidentified person told sexual jokes; (3) the suspension of a former assistant county solicitor who was not escorted from his office and about whom the Commissioners refused to comment to the press; and (4) the political fund raising activity of elected officials. None of these areas are admissible, and all are highly prejudicial to Defendants.

In 1992, four years before Plaintiff was terminated, a non-supervisory employee of the public works department, was reprimanded and suspended without pay for allegedly making a racial slur. Montgomery County had different Commissioners in 1992 than it did in 1996, when Plaintiff was terminated. Indeed, Plaintiff's Complaint alleges that "the campaign to remove Plaintiff began in December 1993 . . ." (Complaint, ¶ 21.) Thus, the 1992 disciplinary action against a non-policy making employee was remote in time, and clearly unconnected to Plaintiff's termination in 1996. Moreover, contrary to Plaintiff's Petition, the Court *permitted* Plaintiff to examine Mr. Mele concerning this incident at trial. 5/29/02 Tr. at 105-108.

Also contrary to Plaintiff's Petition, the Court *permitted* Plaintiff to examine Mr. Mele concerning the Horse Thieves Luncheon. 5/28/02 Tr. at 128-130. The trial record directly contradicts Plaintiff's mischaracterization of that event. Mr. Mele's testimony was that there were no racial remarks at the luncheon, and no references to Plaintiff. This testimony was not relevant, but was nevertheless permitted.

The suspension of the former assistant county solicitor occurred at least six months **after** Plaintiff was suspended, and is not relevant. 5/28/02 Tr. at 152-154. It was a purely personnel matter, and did not involve a federal audit of publicly funded community programs.

Contrary to Plaintiff's Petition, the Court *permitted* Plaintiff to examine Mr. Mele concerning campaign fundraising. 5/28/02 Tr. at 143-146. In Pennsylvania, political fund raising is permitted by law for elected officials. There was no proffer that funds were not appropriately raised or reported pursuant to Pennsylvania Election Law. Unlike Commissioner Mele, Plaintiff is not an elected official, and is subject to different laws and regulations than elected

officials. Plaintiff never alleged that any elected officials violated any disclosure laws.

(b) Richard Buckman

Plaintiff argues that testimony was precluded by former Commissioner Buckman concerning his purchase of an interest in a skiing facility called Spring Mountain. However, the Court *permitted* the examination. 5/30/02 Tr. at 132-134. Mr. Buckman testified that he acquired his interest ***after*** his term as a County Commissioner. This acquisition was irrelevant, but was nevertheless permitted by the Trial Court.

(c) Joseph Hoeffel

Plaintiff argues that testimony was precluded by former Commissioner Hoeffel concerning whether his former law firm received fees some time after the Justice for Victims of Terror Act was passed ***in October 2000***, concerning a judgment by a former hostage against Iran. However, Plaintiff never made any such proffer at trial concerning Mr. Hoeffel's former law firm. *See* 5/30/02 Tr. at 156-213; 5/31/02 Tr. at 1-108. ***The first time in this litigation*** that Plaintiff ever identified this alleged issue was in his Post-Trial Brief, and it has even changed significantly since then. Moreover, any such proffer would have had to have been rejected because, *inter alia*, in October 2000, four and a half years after Plaintiff's termination, neither Plaintiff nor Mr. Hoeffel were Montgomery County employees. This is another irrelevant allegation improperly and belatedly raised by Plaintiff.

4. Plaintiff Was Properly Precluded From Calling The Proffered Witnesses.

Plaintiff proffered three witnesses at trial who were precluded, Jon Fox, Harry Massele and Dr. Mash. Plaintiff did not raise the preclusion of Jon Fox in his Motion for a New Trial (Dkt.#286). Plaintiff's Appellant's Brief and Petition for Certiorari only raise Jon Fox, and do not mention Harry Massele or Dr. Mash. Therefore, Plaintiff waived any claim of error concerning all three witnesses. *Keiser v. Matamoras Cmty. Church*, 66 Fed. Appx. 358, 360, 2003 WL 21000922, *2 (3d Cir. May 05, 2003). Nevertheless, in an abundance of caution, Respondents address the proffer of Jon Fox. Additionally, because Plaintiff's Petition also inexplicably refers to a discovery sanction in excluding the testimony of an unidentified expert witness, Respondents address Dr. Mash, even though he was proffered as a fact witness.

(a) Jon Fox

On appeal, Plaintiff asserted that Jon Fox, who lost a bitterly fought United States Congressional election to Defendant Hoeffel, would: (1) corroborate Plaintiff's testimony that Defendant Hoeffel had a "vendetta" against Plaintiff; and (2) contradict Defendant Mele's testimony concerning the political event called the "Horse Thieves Luncheon."[7] Neither are relevant. Plaintiff was an at-will employee. A personal "vendetta," without any proffered *racial* motivation, is irrelevant. *Connick*, 461 U.S. at 147. Even if some unidentified person told a joke at a political event attended by a County Commissioner, no such statement

7. Curiously, Plaintiff's Petition argues at page 5 that he was prevented from examining Commissioner Mele concerning the Horse Thieves Luncheon, and then admits at page 7 that the Court did allow this testimony.

can be attributed to Defendants. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988).

However, that proposed testimony is not what Plaintiff proffered at trial. Plaintiff's proffer at trial was that former Congressman Fox would:

> testify with regard to the comments made by Joseph Hoeffel *which were critical* of Mr. Wright, and the — his descriptions of the mistreatment ***that the department*** and Mr. Wright received from Mr. Hoeffel, that those criticisms were made publicly, and also as a Commissioner with regard to one point they raised concerning time. They're not obligated to clock in et cetera, and in the concerns that were raised through the review by Buckman and also later by HUD were during the period of time in which he was a Commissioner.

5/31/02 Tr. at 110 (emphasis added).

This proffer was not relevant, and nothing in it was even in dispute. Commissioner Hoeffel readily admitted publicly criticizing Mr. Wright's mismanagement of the MDHS. The HUD Audit did the same thing. It is a public document from a public agency concerning another public agency's management of public funds.

Mr. Fox was ***not*** a Commissioner during the HUD Audit or Plaintiff's suspension and termination. He was elected to Congress in November 1994, and Commissioner Buckman was appointed to complete his term. The HUD Audit began in February 1995. Mr. Fox never reviewed the HUD findings; did not participate in the County's internal investigation; did not participate in the Salary Board's decision to suspend or terminate Plaintiff; and did not participate in the Grievance Hearing.

Mr. Fox could not possibly testify concerning anything related to Plaintiff's termination. For the same reasons, he could not testify concerning the work day requirements set forth in the Montgomery County Handbook, which was revised in December 1994 and April 1995, after Mr. Fox was no longer a Commissioner.

(b) Dr. Mash

Plaintiff's Petition inexplicably states at page 11 that the District Court entered a "discovery sanction" concerning Plaintiff's expert testimony. To the contrary, the Court did not issue any such "discovery sanction." The only Order (Dkt.#229) to which Plaintiff could refer is omitted from Petitioner's Appendix.

At trial, Plaintiff proffered that Dr. Mash treated Plaintiff for rising blood pressure since 1992, long before his termination in 1996. Plaintiff's Pretrial Memorandum proffered Dr. Mash's testimony as "medical treatment . . . due to stress and racial tension during his employment." However, Plaintiff never submitted an expert report. Nor did he ever identify any expert witnesses.

The Federal Rules of Civil Procedure require advance identification of an expert and the disclosure of an expert report. FED. R. CIV. P. 26(a)(2)(B). Therefore, Dr. Mash was required to be precluded as beyond the scope permitted by a fact witness. The Court properly ruled *in limine* that any treating physicians would be limited to damage testimony, and barred from testifying to any expert opinion.

However, at trial, there was also no valid or reliable basis for speculative damages assumptions, and no basis which satisfied FED. R. EVID. 702, 701 and the principles of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

On the trial record, any statements offered by Plaintiff's treating physician would be inadmissible expert opinions. *See* Dkt.#270.

Therefore, the District Court properly prevented Plaintiff's attempt to circumvent its May 20, 2002 Order, Federal Rule of Civil Procedure 26 and the Federal Rules of Evidence by offering Dr. Mash as a fact witnesses, but then examining him on matters properly left to an expert witness. Improper "lay" expert opinions are irrelevant since they are not expert opinions, and are unduly prejudicial pursuant to Federal Rule of Evidence 403, since the jury will likely treat them as expert opinion.[8]

Moreover, to the extent that Dr. Mash's testimony was proffered for the purpose of establishing causation, and was based on any information provided to him by Plaintiff, (which would be inadmissible hearsay), rather than on a medical diagnosis of Plaintiff's condition, the evidence was inadmissible. This was particularly applicable here because Plaintiff's medical records recorded similar symptoms and conditions existing long before Plaintiff's termination. No medical records note any causation from Plaintiff's termination. Thus, any such opinion testimony on causation would be based, not on the physician's "perceptions," but on inadmissible hearsay.

Indeed, in his Post-Trial Motion, Plaintiff stated for the first time that Dr. Mash would have testified factually concerning alleged statements made **to him by Plaintiff**. However, these unproffered inadmissible hearsay statements never even happened, and are directly contradicted by the

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8. The tactic of using delayed "lay" opinions to sneak in undisclosed expert opinions has been forcefully rejected by the December 2000 amendments to the Federal Rules of Evidence and the Federal Rules of Civil Procedure. *See Advisory Committee Notes to FED. R. EVID. 701, 2000 Amendments.*

trial record where the District Court directed the parties to read into the record the precise deposition testimony where Dr. Mash testified that Plaintiff never made any statements to him about any emotional or psychological problems, any employment problems, any problems with Defendants, or any racial discrimination or racial bias. 6/3/02 Tr. at 6-7. Accordingly, his proffered and unproffered testimony was irrelevant.

5. Plaintiff Was Not Prejudiced By His Waiver Of Proffers At Trial.

Other than the three witnesses discussed above, Plaintiff did not proffer at trial any of the witnesses identified in his Petition for Certiorari. Nevertheless, in an abundance of caution, Respondents address the belated *post-trial proffers* of these witnesses.

Plaintiff clearly cannot establish that the exclusion of these witnesses, whom he never intended on calling at trial, prejudiced his case. Even if Plaintiff had proffered any of these witnesses at trial, their testimony could not be attributed to Defendants, would have been irrelevant, and would have been highly prejudicial. None of them had any involvement with Plaintiff's termination, and many of them were not even employees of Montgomery County. Alleged stray remarks by employees not involved in a discharge decision cannot provide a basis for charging other employees with discrimination. *Gomez v. Allegheny Health Servs., Inc.*, 71 F.3d 1079, 1085 (3d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992). Every witness listed in Plaintiff's Petition did not have the authority to bind the Commissioners in any matter relating to this case, and had no involvement in the suspension or termination proceeding.

Additionally, evidence of alleged random, isolated, remote and irrelevant events must be precluded under Federal Rule of Evidence 403 because their probative value is outweighed by the danger of unfair prejudice and jury confusion. FED. R. EVID. 403. *See also Coleman*, 306 F.3d at 1347; *National Freight v. S.E. Pa. Transp. Auth.*, 698 F. Supp. 74, 77 (E.D. Pa. 1988), *aff'd*, 872 F.2d 413 (3d Cir. 1989). Its admission would have required Defendants to present substantial counter evidence and would have created several trials within this trial. The District Court therefore properly exercised its discretion in *preliminarily* precluding it.

(a) "The suspended assistant county solicitor"

Plaintiff's belated post-trial proffer of a former assistant solicitor is specious because he failed to serve him with a trial subpoena, and failed to make any proffer concerning his testimony at trial.[9] The testimony would also have been irrelevant and prejudicial. The suspension of this former assistant county solicitor occurred at least six months *after* Plaintiff was suspended and is not relevant to Plaintiff. He was an *assistant* county solicitor, not a department head; his department was not being audited by the federal government; his alleged misconduct did not relate to misrepresentations and nondisclosures; he had not threatened individuals; and millions of dollars of public funds were not in jeopardy. The employment action taken is incomparable and irrelevant to Plaintiff's termination.

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9. Plaintiff's trial subpoenas are attached to Plaintiff's August 27, 2002 Reply To Defendants' Response In Opposition To Motion For A New Trial (Dkt.#288). For many of the witnesses identified in Plaintiff's Petition, the trial subpoenas simply do not exist or do not have affidavits of service.

(b) The "son of the Clerk of Courts"

Plaintiff's belated post-trial proffer is again specious because he failed to serve this witness with trial a subpoena, and failed to make any proffer at trial. The testimony would also have been irrelevant and prejudicial. The employment action taken with respect to a non-supervisory employee at the emergency dispatch center, is incomparable and irrelevant to the termination of Plaintiff Wright, who was the Director of the MDHS and annually controlled millions of dollars in federal HUD funds.

(c) The "former county personnel director"

Although Plaintiff failed to subpoena this witness, for purposes of this Petition, Respondents will assume that the witness would have voluntarily testified if called because he testified in a deposition. However, Plaintiff failed to proffer the witness at trial, failed to read any deposition excerpts into the record, and his testimony was wholly irrelevant.

Plaintiff's Complaint alleges that "the campaign to remove Plaintiff **began in December 1993** . . ." (Complaint, ¶ 21.) He was terminated in 1996. However, this witness was the Personnel Director in a different administration between 1984 and January 1992, when he left County employment, and moved to New Jersey. In his deposition, the witness admitted that he has no knowledge and could not testify as to any matters that occurred *after* January 1992, which was almost two (2) years before Plaintiff even alleges any alleged discriminatory conduct by Defendants began, and four (4) years before Plaintiff was suspended and terminated. His testimony was therefore remote in time and irrelevant to Plaintiff's allegations. It would have been highly prejudicial, and clearly had no probative value.

(d) The "head of county security"

The belated post-trial proffer of William Hanebury concerning security procedures is cumulative of undisputed testimony presented by Plaintiff and of the Defendant Commissioners. Plaintiff testified at length that he was escorted from his office by security and that certain other suspended employees were not.

(e) The MDHS Staff

The belated post-trial proffer concerning the duties of MDHS staff members are redundant to the extensive testimony presented by Plaintiff concerning them. Assuming *arguendo*, that any one of them would have disputed all or part of the HUD Audit Report, such testimony is also irrelevant. The Defendant Commissioners were entitled to rely upon the findings of the federal government and, in fact, were duty-bound to respond. They also conducted an internal investigation that confirmed HUD's findings, and uncovered substantial additional misconduct. Even if HUD had been completely wrong, and even if the internal investigation had been completely wrong, "the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Fuentes*, 32 F.3d at 765.

(f) The "Two Black employees"

Plaintiff's belated post-trial proffers of two former Montgomery County EEO officers are specious because he never subpoenaed either of them, and failed to make any proffer concerning their trial testimony. Ms. Smith retired to Arizona years ago and is beyond the subpoena power of the Trial Court. Plaintiff also never sought her trial deposition

or her deposition in discovery. Contrary to Plaintiff's Petition, the Court did not even *preliminarily* preclude Mr. Payne. (App. 15a.) Mr. Payne also left County employment years ago. Significantly, Plaintiff took Mr. Payne's deposition and could have read excerpts into the record at trial, but elected not to do so because the testimony was not helpful to his case.

(g) The former County Sheriff

Plaintiff's belated post-trial proffer is specious because he failed to serve this witness with a trial subpoena, and failed to make any such proffer at trial. The former County Sheriff was an elected official and therefore subject to public laws outside of the Montgomery County Handbook. He allegedly made a remark to a reporter in the Spring of 1998, two years *after* Plaintiff's termination, when he was clearly acting outside the scope of his employment, and as campaign manager for a Congressional candidate. The reporter has since published a retraction. This alleged statement cannot be attributable to any of the Defendants, and is wholly irrelevant to Plaintiff's claim. *Gomez*, 71 F.3d at 1085.

(h) Michael Marino

Plaintiff did not proffer Michael Marino at trial. Plaintiff's belated proffer of Mr. Marino has changed substantially since it was ***first*** made in Plaintiff's ***post-trial*** Motion. In his Motion for a New Trial, Plaintiff proffered that Mr. Marino would have testified concerning (1) a meeting with the County Commissioners while he was the District Attorney and (2) the appointment of certain County officials *in the Summer of 2002 after this trial concluded.* (Dkt.#s 286, 288.)

Testimony about the purported meeting would have been cumulative because Montgomery County Chief of Detectives Oscar Vance and Plaintiff both testified at trial about it. That testimony was wholly irrelevant to this case, and did not substantiate Plaintiff's proffer concerning the issue. Any further testimony by Mr. Marino would have been redundantly irrelevant. Plaintiff also had the opportunity to cross examine Messrs. Mele, Buckman and Hoeffel concerning any meeting with either Chief Vance or Mr. Marino concerning this issue, but chose not to do so.

Plaintiff's ***post-trial proffer*** of testimony concerning the County's ***August 2002*** appointment of a new County Solicitor, and in ***June 2002*** of a new Director of Health Services has no relevance to Plaintiff's termination over six years earlier in 1996 by different Commissioners. Plaintiff's claim that the Court erred in excluding evidence of something that, not only was not proffered, ***but had not yet even happened as of the time of trial in May 2002***, is specious.

Similarly, Plaintiff proffers *for the first time on appeal* that another elected official, the current District Attorney, hired Mr. Marino's son as a detective in September 2002, ***which was even after Plaintiff filed his post trial Motion and Supplemental Post Trial Motion.*** His proffers for the first time on appeal concerning alleged events that occurred *after* this trial are disingenuous.

6. Plaintiff Is Not Entitled To A New Trial

Plaintiff's appeal is based exclusively on the purported "blanket" preclusion of evidence more fully briefed *supra*. As set forth above, Plaintiff has not demonstrated how he was prejudiced so as to require a new trial.

(a) Plaintiff Failed To Submit Sufficient Evidence To Establish A *Prima Facie* Case Under § 1981.

Plaintiff was required to prove the *prima facie* elements: (1) that he engaged in protected activity; (2) that Montgomery County took adverse action against him; and (3) that a causal link exists between the protected activity and the discharge. *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); *Quiroga v. Hasbro, Inc.*, 934 F.2d 497 (3d Cir.), *cert. denied*, 502 U.S. 940 (1991). Plaintiff was required to show that Defendants retaliated against him and that his race had a determinative effect on the outcome of that process. *Hazen Paper v. Higgins*, 507 U.S. 604, 610 (1993); *Aguiar v. Morgan Corp.*, 27 Fed. Appx. 110, 112, 2002 WL 90980, *1 (3d Cir. Jan 23, 2002).

Plaintiff never testified, and submitted no other evidence, that the actions about which he protested had anything at all to do with race. 5/22/02 Tr. at 2-150; 5/23/02 Tr. at 2-182; 5/24/02 Tr. at 2-65. Rather, he testified that he submitted generalized management issues concerning the MDHS. As set forth above, it is not enough to show nonspecific complaints about unfair treatment. *Walden*, 126 F.3d at 512 n.4. Plaintiff never raised the issue of race to Defendants, and they never received any complaints from Plaintiff regarding racial discrimination.

Additionally, Plaintiff failed to present any evidence of any causal link between his pre-trial claims of alleged protests and his suspension and termination. Indeed, the evidence of record is overwhelming that Mr. Wright's termination was because of the HUD Audit Report and the internal investigation. No reasonable jury could find that, but for Plaintiff's protesting against his own alleged mistreatment for being a member of a racial minority, he would not have been terminated. *Fuentes*, 32 F.3d at 764.

(b) Plaintiff Submitted No Evidence That Defendants' Proffered Reasons For His Termination Were Pretextual.

Defendants were entitled to rely upon HUD's findings. *Fuentes*, 32 F.3d at 765. After Defendants submitted clear, specific evidence regarding the legitimate non-retaliatory reasons for Plaintiff's termination, the burden shifted to Plaintiff to show those reasons were pretexts. *McDonnell Douglas*, 411 U.S. at 802. Plaintiff failed to submit sufficient evidence from which the jury could reasonably believe that the reasons for suspension and termination were pretextual. *Simpson v. Kay Jewelers*, 142 F.3d 639, 644 (3d Cir. 1998).

Plaintiff also failed to produce evidence showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Defendants' stated legitimate non-retaliatory reasons, or any evidence which would allow a reasonable jury to find that retaliation for complaints about race was a determinative factor in his termination. *Johnson v. Resources for Human Development*, 878 F. Supp. 35, 38 (E.D. Pa. 1995), *aff'd*, 77 F.3d 462 (3d Cir. 1996). *See also Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101 (3d Cir. 1997); *Ezold*, 983 F.2d 509.

(c) Plaintiff Failed To Show That A Majority Of The Salary Board Acted With An Improper Motive.

The Salary Board consists of the three County Commissioners and the Controller. 16 P.S. § 4822. Only the Salary Board can terminate a County employee. 16 P.S. § 4820. Montgomery County can only act through a majority of its Salary Board, which requires three (3) out of four (4) votes. 16 P.S. §§ 4822, 4825(c).

Plaintiff was required to prove that a majority of the four person Salary Board was motivated by racial animus. *City of St. Louis*, 485 U.S. at 123; *LaVerdure v. Montgomery County*, 324 F.3d 123, 125 (3d Cir. 2003). Plaintiff failed to produce *any* evidence that *any* member acted in retaliation against Plaintiff for *any* reason. He never even *testified* that *any* of the four members of the Salary Board were racially motivated. He specifically admitted that Commissioner Buckman did not possess any racial animus. 5/22/01 Tr. at 121. He also never asserted any allegations against the fourth member of the Salary Board, Controller Richard Sundheim. Therefore, Plaintiff failed to prove that a majority of the Salary Board possessed any racial animus.

CONCLUSION

For the forgoing reasons, Plaintiff's Petition for Certiorari must be denied. The jury verdict, the District Court's post-trial decisions, and the decision of the Circuit Court of Appeals must be affirmed. The trial record is overwhelming that Defendants acted properly in terminating Plaintiff.

The United States Court of Appeals for the Third Circuit "reviewed this matter and . . . examined the district court's comprehensive series of orders and dispositions" and concluded that "it is very clear to us that the district court was very diligent in its management of this case and, exercising the appropriate standards of review, we find no error in its numerous dispositions." (4a.) This holding is not in conflict with any decision of a different panel of *any* Circuit Court.

Respectfully submitted,

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